Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-589

DELBERT D. BIRCHFIELD,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October, 1976

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Comes now your petitioner, Delbert D. Birchfield, and respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above styled case on August 25, 1976.

OPINIONS BELOW

There was no formal opinion of the United States District Court. Exerpts of the transcript are included herein.

The memorandum opinion of the United States Court of Appeals is not reported. It is reproduced in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1976 (Infra, Appendix A). A petition for rehearing was denied on October 4, 1976 (Infra, Appendix B). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. § 1254 (1).

QUESTIONS PRESENTED

Whether, when a defendant pleads guilty to a criminal charge in the United States District Court, the District Judge must advise the defendant of certain constitutional rights which are being waived by such a plea, thereby ensuring that the plea entered by the defendant is truly voluntary and intelligently made.

Your petitioner, Delbert D. Birchfield, was charged by indictment returned June 25, 1975, with knowingly making false statements for the purpose of influencing the action of a federally insured bank in order to obtain a loan.

Thereafter, on the 17th day of July, 1975, the defendant, petitioner herein, entered a plea of guilty to the indictment and the Court set sentencing and entry of judgment on the 28th day of August, 1975. The petitioner was sentenced to the maximum term of two (2) years incarceration in a federal reformitory.

At the arraignment, the Court put forth several questions to the defendant, to-wit: The Court asked if defendant knew of the punishment which could be imposed both upon a guilty and not guilty plea (Tr. 3); the Court asked defendant if his plea was voluntary and free (Tr. 5), the Court asked if defendant knew that he was giving up his right to trial by jury (Tr. 5); the Court asked defendant about the crime he was pleading guilty to, thereby

establishing a factual basis for the plea (Tr. 6).

During the course of its inquiry, the Trial Court did not, however, attempt to determine whether defendant knew of certain basic constitutional rights which were being waived by pleading guilty to the offense charged. It did not ascertain if defendant knew that by pleading guilty he was waiving his constitutional privilege against compulsory self incrimination, nor did it ascertain if defendant knew that by pleading guilty he was waiving his constitutional right to confront his accusers.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in part as follows:

> ". . . nor shall be compelled to be a witness against himself . . ."

The Sixth Amendment to the United States Constitution provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and shall enjoy the right to be confronted with the witnesses against him."

Rule 11 of the Federal Rules of Criminal Procedure, dealing with pleas, provides as follows:

> Before amendment, "The Court shall not accept a guilty or nolo contendere plea without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement."

and,

"Notwithstanding the acceptance of a plea of guilty, the Court should not enter a judgment upon such a plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

After amendment, "Before accepting a plea of guilty or nolo contendere, the Court must address the defendant personally in open court and inform him of, and determine that he understands the following: (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and (2) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury, and at that trial has the right . . . to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself . . ."

REASONS FOR GRANTING THE WRIT

The petitioner's sole contention is that this Court, in *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969), laid down certain admonitions which are required to be given to a defendant before a court can accept a guilty plea, and that the Trial Court in this case erred in not advising a defendant of the important constitutional rights which he was waiving by a plea of guilty. These admonitions will assure that a guilty plea is intelligently and voluntarily entered into, and if reflected in the record will leave no doubt as to defendant's desire.

This Court in *Boykin* (Supra), stated:

> "Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self incrimination, . . . second is the right to trial by jury . . . third is the right to confront one's own accusers . . . We cannot presume a waiver of these important federal rights from a silent record."

It is apparent from a reading of the transcript that the defendant was advised that he was giving up his right to a trial by jury (Tr. 5). It is further apparent, however, that the Court failed to advise him of the other two *Boykin* admonitions. If this Court's mandate, "We cannot presume a waiver of these important federal rights from a silent record," is to have any force and effect, then it is beyond a doubt clear that the District Court erred by not ascertaining whether defendant knew of these other two important constitutional rights. The record is completely bare of any reference to defendant's right to confront his accusers and his privilege against compulsory self incrimination. At best, this Court can only surmise as to whether defendant understood that he was foregoing these important constitutional rights.

In addition to the Court's language in *Boykin* (Supra), this Court on many occasions has told us that before a waiver can be effective there must be "an intentional relinquishment or abandonment of a *known* right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed.2d 1461 (1938). It is difficult, if not impossible, for a defendant to *know* of his right to confront his accusers and his privilege against compulsory self incrimination unless the Trial Court so questions the defendant. Without such questioning, we can only assume that defendant is intentionally relinquishing or abandoning a known right or privilege.

Since a guilty plea is a grave and solemn act which in effect causes the defendant to be a witness against himself and which is not a mere admission of extra-judicial

confession, but is itself a conviction and is as conclusive as the verdict of a jury, the Trial Court should accept such a plea only with great care, discernment and circumspection. Nowhere in this case will the record reflect that the Trial Court took great care or was circumspect in accepting the defendant's guilty plea.

It is petitioner's contention that knowledge of these three (3) constitutional rights is a sin qua non of an effective waiver and, a fortiori, an effective guilty plea. Unless this position is accepted as correct, this Court's decision in *Boykin* will be reduced to a mere form of words completely lacking in substance.

This Court has taken great pains and has been innovative in developing the law with respect to the rights of the accused. The Court has been accutely aware of the fact that defendants in criminal cases are not always fully aware of their rights and the nature of the proceedings against them, and because of such fact, we have seen that before there can be a fair and just trial, a defendant must be advised of his rights. To retreat from the plain implication in *Boykin* (Supra) will be a step backwards into the darkest era of the law.

If there be any doubt as to this Court's intentions when it decided *Boykin* (Supra), petitioner would direct the Court's attention to the legislative comments to Federal Rules of Criminal Procedure, Rule ll. Although the rule which codified the admonitions in *Boykin* (Supra) was not to become effective until July 31, 1975, fourteen (14) days after the petitioner's guilty plea, from a reading of these comments we gain some insight as to this Court's intentions:

> The advisory committee states, "Subdivision (c) prescribes the advice which the Court must give the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the Court determine that the plea was made with an understanding of the nature of the charge and the consequences of the plea. The amendment identifies more specifically that must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama,* which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty."

This petitioner is well aware that the above-quoted comments do not have the force of law and are binding on no Court, but it is urged that they do give us insight as to the Court's intentions when it decided *Boykin* (Supra).

Petitioner would also urge the Court to consider the fact that the amendments to Rule ll were set down by this Court on April 22, 1974, almost thirteen (13) months prior to the defendant's plea of guilty. And even though such amendments were not to take effect until July 17, 1975, all lower courts were well aware of their duties to an accused in a criminal case. This point is well emphasized in the case at bar by the fact that the District Court did ask the defendant if he knew he was waiving his right to a jury trial. This question would not be required under Rule ll prior to its amendment. It is apparent that the District Court was fully aware of its duty to the defendant, and intended to advise the defendant, but through oversight failed to give two of the three admonitions.

Finally, the Court should recall that the government is not prejudiced if the defendant is permitted to plead anew

since the government would be permitted to continue its prosecution against the petitioner. If the government's case is sufficient to prove beyond a reasonable doubt the guilt of your petitioner, then certainly the same would be done. However,this petitioner would be greatly prejudiced if his plea was entered only as a result of a misconception on his part of the nature of the law in this particular case, as well as a misconception of his rights enunciated in the *Boykin* (Supra) decision.

CONCLUSION

The constitutional rights afforded to each and every one of us are not matters to be taken lightly. These rights must be seriously considered as they are the cornerstones of a free society, and as such, form the basis of a nation of law, not of men. If this Court retreats from its holding in *Boykin v. Alabama* (Supra), these rights of which we speak, and which are enjoyed by an accused, are reduced to mere words with no significant meaning.

In this case, and in many others of the same character, where no clear rule is found, we are concerned with a man who in a criminal case comes before a judge wishing to confess his guilt and thus taking the first step toward rehabilitation. Because the accused is a layman we cannot presume that he is aware that by pleading guilty he is foregoing his right to a jury trial, his right to confront his accusers and his privilege against compulsory self incrimination. Is it too much to ask the Court to question the defendant with respect to these constitutional rights? We think not. The petitioner in this case could not make a knowing and intelligent waiver of these three (3) constitutional rights unless he was made aware of them. Although the Trial Judge in this case did advise the

defendant that by pleading guilty he was waiving his right to a jury trial (Tr. 5), he failed to advise him of the other two constitutional rights which were being waived by a plea of guilty.

As the decisions below have caused great prejudice to your petitioner and have clearly transgressed from this Court's decision in *Boykin v. Alabama* (Supra), this Court is warranted in calling for a review of the decision below. Therefore, your petitioner prays that a writ be issued.

Respectfully submitted,

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and

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October, 1976

Appendix A

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. DELBERT D. BIRCHFIELD, Defendant-Appellant.	)	No. 75-1967

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CR-75-154-E)

Robert B. Smith, filed a memo opposing summary action on behalf of appellant.

Mr. David L. Russell, U.S. Attorney, Ms. Susie Pritchett,

Asst. U.S. Attorney, appeared on behalf of appellee.

Before Honorable John C. Pickett, United States Senior Circuit Judge, Honorable Oliver Seth and Honorable Robert H. McWilliams, United States Circuit Judges.

PER CURIAM

This is an appeal from an order of the United States District Court for the Western District of Oklahoma denying relief pursuant to 28 U.S.C. § 2255. We affirm.

Appellant Birchfield was charged, by indictment returned June 25, 1975, with knowingly making false statements for the purpose of influencing the action of a federally insured bank in order to obtain a loan. He pleaded guilty to the charge on July 17, 1975 and was sentenced on August 28, 1975 to two years imprisonment, the maximum term that could be imposed. Birchfield filed a motion for reduction of sentence which was unsuccessful. He took no direct appeal from his conviction and sentence.

The instant proceedings were initiated on November 4, 1975 when Birchfield filed a § 2255 motion alleging that the district court failed to determine whether he understood that, by pleading guilty, he was giving up his rights to

confront his accusers and not to incriminate himself. In support of his motion, Birchfield cited both the United States Constitution, as construed by Boykin v. Alabama, 395 U.S. 238 (1969), and Rule ll of the Federal Rules of Criminal Procedure.

We first consider whether the district court satisfied the requirements of Rule ll, F.R.Crim.P., in accepting Birchfield's guilty plea. Rule ll was amended on April 22, 1974, to be effective July 31, 1975. In support of his motion, Birchfield places reliance upon portions of Rule ll which were not to take effect until July 31, 1975. Since Birchfield's guilty plea was entered July 17, 1975, we must look to the requirements of Rule ll as they existed prior to Birchfield's guilty plea. During the times applicable to the instant proceedings, Rule ll required that, before a district court accepted a guilty plea, it determine that the plea was given voluntarily, with an understanding of the nature of the charge and consequences of the plea, and that the judge be satisfield that a factual basis existed for the plea. McCarthy v. United States, 394 U.S. 459, 467 (1969); Guthrie v. United States, 517 F.2d 416 (9th Cir. 1975); United States v. Thomas, 468 F.2d. 422 (10th Cir. 1972), cert. den. 410 U.S. 935. There is no requirement pursuant to Rule ll that the trial judge, prior to accepting a guilty plea, spell out for the defendant every conceivable constitutional right waived by the guilty plea. United States v. Ready, 460 F.2d. 1238 (4th Cir. 1972). *See also,* Fruchtman v. Kenton, 531 F.2d. 946 (9th Cir. 1976).

Prior to accepting Birchfield's guilty plea, the district court advised Birchfield of his right to plead guilty, not guilty, or nolo contendere; established that the guilty plea was not the result of promises, threats or coercion; advised

Birchfield that, by pleading guilty, he was giving up his right to a jury trial where he would be presumed innocent and the government required to prove his guilt; and informed Birchfield of the maximum sentence which could be imposed. Finally, the district court informed Birchfield that Rule ll, F.R.Crim.P., requires that a factual basis be established for any plea accepted. The court then went through the indictment with Birchfield, part by part, and established the truth of the facts alleged. It is thus clear that the district court satisfied the requirements of Rule ll: the plea was determined to be voluntary; it was determined that Birchfield understood the nature of the charge and consequences of the plea; and the sentencing judge satisfied himself as to the factual basis for the plea. And, if this were not enough, counsel for Birchfield established a further factual basis for the plea at the sentencing proceedings when arguing for a more lenient sentence.

Birchfield is also mistaken that the district court failed to satisfy federal constitutional requirements, as defined by case law, in accepting his guilty plea. Birchfield places primary reliance on Boykin v. Alabama, *supra,* which does in fact establish a requirement that the record affirmatively disclose that a defendant pleaded guilty both understandingly and voluntarily. *Boykin* does not require, though, that the rights contended for by Birchfield be specifically enumerated. Stinson v. Turner, 473 F.2d. 913 (10th Cir. 1973). *See also,* Wilkins v. Erickson, 505 F.2d. 761 (9th Cir. 1974); United States v. Berlin, 437 F.2d. 901 (7th Cir. 1971). The record in this case establishes that the requirements of *Boykin* were satisfied.

Upon docketing, the parties were notified that this case was to be considered on the record of proceedings before

the district court and without oral argument. Counsel for Birchfield has responded with a memorandum opposing affirmance. We have carefully considered this memorandum brief, as well as the files and records in this case, and are convinced that the judgment of the district court is correct.

Affirmed. The mandate shall issue forthwith.

Appendix B

SEPTEMBER TERM - October 4, 1976

Before Honorable John C. Pickett, United States Senior Circuit Judge, and Honorable Oliver Seth and Honorable Robert H. McWilliams, United States Circuit Judges

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	NO. 75-1967
DELVERT D. BIRCHFIELD,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the above case.

Upon consideration whereof, the petition for rehearing is denied by Senior Circuit Judge Pickett, and Circuit Judges Seth and McWilliams to whom the appeal was submitted. The ground upon which the petition for rehearing is based was specifically addressed in our opinion affirming the judgment of the district court.

Our earlier order of September 7, 1976 stayed the mandate until October 3, 1976. Mandate is further stayed until thirty (30) days from the date of today's order, pending certiorari. If, on or before thirty (30) days from today's date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue

until final dispostion by the Supreme Court.

s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

Supreme Court, U. S.
FILED
DEC 23 1976
MICHAEL RODAK, JR., CLERK

No. 76-589

In the Supreme Court of the United States

OCTOBER TERM, 1976

DELBERT D. BIRCHFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-589

DELBERT D. BIRCHFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his conviction must be vacated under 28 U.S.C. 2255 because the district court did not personally advise him that by pleading guilty he would waive his right to confront his accusers and his privilege against self-incrimination.

An indictment returned in June 1975 in the United States District Court for the Western District of Oklahoma charged petitioner with one count of knowingly making false statements on a loan application for the purpose of influencing the action of a federally insured bank, in violation of 18 U.S.C. 1014. On July 17, 1975, petitioner pleaded guilty to the charge in the indictment (Pet. App. 2a).

Before accepting the plea the district court determined that petitioner understood the offense charged, it explained that by pleading guilty petitioner would waive his right to trial by jury, and it informed petitioner that if he were to go to trial he would be clothed with the presumption of innocence and that the government would have the burden of establishing his guilt beyond a reasonable doubt. The judge further informed petitioner that the maximum penalty for the offense was two years' imprisonment and a fine of $5,000 and established that petitioner's plea of guilty was free and voluntary and was not the product of threats or promises (Pet. App. 3a-4a; Tr. 3-5). The court then questioned petitioner about the factual basis for the plea (Tr. 6):

> [I]s it true that on or about the 29th of April of this year, here in Oklahoma County, that you knowingly made false statements to the American Bank of Commerce for the purpose of influencing that bank in granting you a loan?

Petitioner responded "[y]es, sir" and also admitted that at the time he made the false statements he was aware that the bank was federally insured (Tr. 6). In light of these responses the court agreed to accept the plea of guilty. On August 28, 1975, petitioner was sentenced to two years' imprisonment.

Petitioner did not appeal his conviction. On November 4, 1975, however, petitioner filed a motion under 28 U.S.C. 2255, contending that the district court had failed to determine whether he understood that, in pleading guilty, he was waiving his rights to confront his accusers and not to incriminate himself. The district court denied relief, and the court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. 1a-5a).

Petitioner's claim (Pet. 4-5) that his guilty plea was accepted in violation of the requirements of *Boykin* v. *Alabama*, 395 U.S. 238, is insubstantial. As the court of appeals noted (Pet. App. 4a), and as petitioner concedes (Pet. 7), the district judge complied fully with the requirements of Rule 11, Fed. R. Crim. P., by conducting a personal inquiry of petitioner and satisfying himself that petitioner's plea was voluntarily made with an understanding of the nature of the charge and the consequences of the plea. Although the court did not explicitly mention that the guilty plea would waive petitioner's privilege against self-incrimination or his right to confront his accusers, there is no requirement that a defendant be informed of every conceivable constitutional right he would enjoy at trial before his plea of guilty may be considered knowing and intelligent.[1] Indeed, it is significant that petitioner does not allege that he was in fact unaware of his constitutional rights or that his plea was in fact involuntary.

Boykin v. *Alabama*, *supra*, is not to the contrary. In that case, the defendant was convicted following a guilty plea proceeding in which, "[s]o far as the record shows, the judge asked no questions of [the defendant] concerning his plea, and [the defendant] did not address the court." 395 U.S. at 239. In these circumstances, the Court concluded that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242. Here, by contrast, the record clearly

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[1]Effective December 1, 1975, Rule 11 has been amended to require federal courts to address the defendant personally with regard to his right to confront and cross-examine witnesses against him and his right not to be compelled to incriminate himself (Rule 11(c)(3)). As petitioner recognizes (Pet. 7), these amendments were not in effect on the date of his plea.

indicates that petitioner's plea was knowing and intelligent.[2] Finally, although the Court in *Boykin* listed several constitutional rights that are waived by pleading guilty and that the trial judge in that case had failed to mention, these rights were enumerated merely to emphasize the gravity of the trial judge's responsibility, because a defendant who pleads guilty simultaneously waives these rights as well as several others. *Boykin* did not impose a procedural requirement that federal judges enumerate these rights at the Rule 11 proceeding. See *Fontaine* v. *United States*, 526 F. 2d 514, 516 (C.A. 6), certiorari denied, 424 U.S. 973; *Todd* v. *Lockhart*, 490 F. 2d 626, 628, n. 1 (C.A. 8); *United States* v. *Sherman*, 474 F. 2d 303, 305 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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[2]As the Court stated in *Brady* v. *United States*, 397 U.S. 742, 747-748, n 4: "The new element added in *Boykin* was the requirement that the record must affirmatively disclose that a defendant who pleaded guilty [in state court] entered his plea understandingly and voluntarily," a requirement already existing in federal courts under Rule 11. See *McCarthy* v. *United States*, 394 U.S. 459, 467.